SUPREME COURT, U. S.

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No. 70-202

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE KROGER CO., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General,
GREGORY B. HOVENDON,
STEPHEN RUBIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JOSEPH MARTIN, Jr.,
General Counsel,
HAROLD D. RHYNEDANCE, Jr.,
Assistant General Counsel,
MILES J. BROWN,
KARL H. BUSCHMANN,
Attorneys,
Federal Trade Commission,
Washington, D.C. 20580.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. CA: 1-15) is reported at 438 F.2d 1372. The initial decision of the hearing examiner (Pet. Sep. App. ID: 99-169) and the final order and opinions of the Federal Trade Commission (Pet. Sep. App. FT: 1-89, D: 90-98) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. CA: 16-17) was entered on February 25, 1971. The petition for a writ of certiorari was filed on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a buyer who, through knowingly misrepresenting the prices quoted by a competing seller, induces his seller to grant prices below those offered by the seller's competitors, violates the prohibition in Section 2(f) of the Robinson-Patman Act against inducing unlawful price discriminations, even though the seller's discriminatory prices were not illegal because justified as a good faith attempt to meet what it believed were its competitors' lower prices.

2. Whether the finding of the Federal Trade Commission that the Kroger Company knowingly induced and received discriminations in price, thereby violating Section 2(f) of the Robinson-Patman Act, is supported by substantial evidence and is in conformity with applicable law.

STATUTES INVOLVED

Subsections 2 (a), (b) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a), (b) and (f), provide in relevant part:

> SEC. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Co-

lumbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition, with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(f) That it shall be unlawful for any person engaged in commerce, in the course of such

commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 554 of the Administrative Procedure Act, 80 Stat. 384, 5 U.S.C. 554 (Supp. V), provides in relevant part:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of
>
> * * * * *
>
> (2) the legal authority and jurisdiction under which the hearing is to be held; and
>
> (3) the matters of fact and law asserted.

STATEMENT

In 1965 the Federal Trade Commission issued a complaint (Pet. Sep. App. 170–179) charging Beatrice Foods Company ("Beatrice") with selling fluid milk and other dairy products under private label to petitioner Kroger Company at prices substantially below those at which it sold products of like grade and quality to Kroger's retail competitors, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(a). In a separate count, the complaint charged Kroger with violating Section 2(f) of the Act by knowingly inducing or receiving unlawful discriminations in price from Beatrice. Following a hearing, the trial examiner dismissed the complaint against both parties (Pet. Sep. App. ID: 101–169). The Commission affirmed the examiner's determination that Beatrice had established a good faith meeting-of-competition defense under Section 2(b) of the Act (Pet. Sep. App. FT:4, 70–71,

88), but held that Beatrice's defense did not thereby immunize Kroger, which had reason to know it was obtaining substantial price discriminations from Beatrice that were not cost-justified and were below prices offered by Beatrice's competitors (*id.* at 89). The Commission therefore held that Kroger had violated Section 2(f). The Court of Appeals for the Sixth Circuit unanimously affirmed (Pet. App. CA:1–15).

1. Kroger is the nation's third largest operator of retail supermarkets, with annual sales in excess of 2 billion dollars. In 1963 it owned more than 1400 supermarkets located in 19 states. In 1962–1963, Kroger's Charleston Division included 44 supermarkets located in West Virginia, eastern Kentucky and southern Ohio. Kroger was the largest retailer of grocery products in the Charleston market during this period, with combined annual sales of approximately 68 million dollars. In 1961, Kroger sales of dairy products in that market exceeded 2 million dollars. (Pet. Sep. App. FT. 8–9, ID:109–111; CX 88A, CX–156.)[1]

Prior to 1962, all dairy products in the Charleston area were marketed under brand names of the dairies, and most retail stores carried two or more such brands in their dairy counters. Customers received the "full service" method of milk distribution: routemen delivered and stocked the dairy cases. Prices generally were based on a percentage discount from

[1] "CX" refers to Commission exhibits; "Tr." refers to the hearing transcript.

wholesale list, and fluctuated from section to section of the Charleston market according to prevailing competitive conditions (Pet. Sep. App. FT:11–12).

The series of negotiations that culminated in Kroger's challenged conduct began in November 1961, when Kroger decided to explore private-label dairy sales for supermarkets in its Charleston Division, and "specially designated" Mr. Francis Casserly, manager of an adjacent division, to conduct negotiations with Charleston Division dairies (Pet. Sep. App. FT:83). Casserly, who possessed "a thorough knowledge of the dairy industry" (*ibid.*) and "who was well experienced in private label operations" (*id.* at 43), made a careful analysis of dairy production and pricing in the Charleston area (Pet. Sep. App. ID:146; Tr. 566–575). He initially invited several dairies then serving Kroger stores with their own brands—including Valley Bell, Broughton, Borden and Fairmont—to submit bids for bottling Kroger label milk for use in all Charleston Division stores.

Broughton Dairy responded first. On January 6, 1962, it submitted a bid (CX–103) containing tabulations for each Kroger store location, showing the existing retail price, the corresponding wholesale price, the proposed private label price, and a percentage figure for Kroger's gross profit. The prices contained in Broughton's bid averaged 77 cents per gallon jug, although some were as high as 86 cents for certain stores (CX–103). Computations based on the Broughton proposal reveal that "prices in the bid averaged

a discount of 10.9 per cent" off list (Pet. App. CA:5; Pet. Sep. App. FT:15–16).[2]

In notifying the other dairies of Broughton's offer, Casserly depicted this as being "in the neighborhood of 20 percent off list" (Tr. 375, 595–596, 717)—a discount which, as a Beatrice Foods representative later testified, "was pretty much unheard of in this market area at that time" (Tr. 489).[3] Casserly further informed the dairies that he expected a discount greater than 20 percent because of the larger volume of milk Kroger would require for the Charleston Division, because only a "stripped service" was being requested, and because of the general deterioration in wholesale milk prices in the Charleston area (Pet. Sep. App. ID:118).

On January 12, 1962, Beatrice representatives met with Casserly to discuss participation in the private-label bidding.[4] Casserly stated that he had already met with representatives of Fairmont and Broughton, and that Broughton had proposed discounts of 20 percent off list price (Tr. 487–488). He summarily rejected Beatrice's offer of a 15 percent discount stating, "[F]orget it, I have already got one at 20" (Tr. 375). On

[2] It is undisputed that the price per gallon jug was the most important item in the negotiations, see *e.g.*, Tr. 388.

[3] This was the discount at which Broughton supplied private-label dairy products, on a full service basis, to the Columbus Division (Tr. 717).

[4] Casserly had not initially notified Beatrice, which at that time served 26 Kroger supermarkets under its own brand, because of what he considered to be deficiencies in its milk containers. Beatrice representatives assured Casserly that they could furnish the containers desired, and he then invited their bid (Tr. 370–372).

February 9, 1962, Beatrice representatives quoted a price of 71 cents for a gallon jug of milk, arrived at by applying a discount of 16 to 17 percent to a base figure of 85 cents (Tr. 494–495).[5] Casserly again rejected this on the basis that he had received a bid from Broughton offering 20 percent off list (Tr. 495).

After receiving bids from the other dairies and another bid from Broughton,[6] Casserly again met with Beatrice representatives, who revised their offer to 68 cents per gallon jug. This quotation was intended to meet the "20 percent discount, the Broughton discount from the 85-cent jug" (Tr. 497). Casserly told the Beatrice representatives that "now you are getting—you are in a position of being competitive with some of the other people" (Tr. 498). After further negotiations, Casserly accepted Beatrice's later proposal of 66 cents per gallon jug and in June 1962, Beatrice began supplying Kroger stores with private-label dairy products. Beatrice continued to charge its other retail customers in the Charleston area the list price less discounts ranging from 5 to 15 percent (Pet. Sep. App. ID:138).

[5] Trade discounts in the Charleston Division at that time "were generally ten per cent, some of them as high as 15 per cent" (Tr. 495).

[6] Broughton made a second offer of 72 cents for a gallon jug on February 12, based on a cost-plus formula (CX–106); in March, it proposed prices ranging from 66 cents to 69 cents, based upon lowered raw milk costs (Pet. Sep. App. ID:125). Fairmont's first proposal, made in late February, contained prices that ranged, in the five key West Virginia sub-markets, from 66 cents to 82 cents for a gallon jug (Pet. Sep. App. FT:27; CX–125). After a further meeting with Casserly, Fair-

2. The Commission, agreeing with the hearing examiner, concluded that Beatrice had granted substantial discriminations in price to Kroger during the term of the private label contract.[7] The Commission found that the discriminations averaged more than 28 percent in one market, 17 percent in other markets, and 12 percent in Charleston (Pet. Sep. App. FT:48-51; Pet. App. CA:14).[8] In cottage cheese the price discrimination was as high as 41 percent (*ibid.*).

However, the Commission upheld the examiner's dismissal of the charges against Beatrice under Section 2(a) of the Robinson-Patman Act (see p. 4, *supra*), on the basis that the evidence sustained Beatrice's good faith meeting-of-competition defense under Section 2(b) of the Act (Pet. Sep. App. FT:69, ID: 168).

As to the charges against Kroger under Section 2(f), which the examiner had also dismissed, the Commission concluded that "the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays his cards so close to his vest as to persuade the seller to come down just a little

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mont submitted an alternative bid on March 9, based upon fluctuations in the cost of raw milk, quoting prices from 65 cents to 73 cents for a gallon jug (Pet. Sep. App. FT:28-29; CX-123; Tr. 622). Borden submitted three alternative proposals in March; these varied with the service and form of delivery rendered (CX-97). Only one dairy, Valley Bell, declined to submit a proposal. (Pet. Sep. App. ID:123; CX-137).

[7] By stipulation, the parties agreed to limit the time period involved to June 1962 through October 1963.

[8] The examiner found that the discriminations averaged 16 percent, and were as large as 30.8 percent (Pet. Sep. App. ID:146).

more, and not on the seller who has tried by every proper means to feel out the opposition" (*id.* at 68).[9] Noting Kroger's pre-eminent bargaining position in relation to its dairy sellers, the Commission found that "Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 percent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was 'competitive' without having made any comparison of the bids; and when he *failed* to convey any *correct* information about the price levels being quoted by others" (Pet. Sep. App. FT:81, emphasis in original).

3. The Court of Appeals for the Sixth Circuit unanimously affirmed in an opinion by Mr. Justice Clark, sitting by designation. The court held that "the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices" (Pet. App. CA:9). Thus, in order for the buyer to obtain immunity under Section 2(b), the

[9] Only Commissioner Jones found Kroger alone to have violated the statute (Pet. Sep. App. FT:4–89). Commissioners Dixon and MacIntyre expressly concurred in Commissioner Jones' holding as to Kroger, although they favored holding Beatrice liable as well (*id.* at 90–95). Commissioners Elman and Nicholson dissented, concluding that no violation of the Robinson-Patman Act had occurred (*id.* at FT:89, D:96–98).

discriminations "must come within the defenses of that section not only from the seller's point of view but also from that of the buyer" (*id.* at 10). The court held that the Commission's findings of misrepresentation of the Broughton bid were "fully supported by substantial evidence throughout the record" (*id.* at 10), that counsel for the Commission had timely raised before the hearing examiner the issue of Kroger's misrepresentation, and that throughout the proceedings Kroger had been adequately apprised of the charges against it (*id.* at 11).

ARGUMENT

1. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. 13(f), makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section." [10] A major reason for the Act was the economic evils associated with the buying power of the large chain stores. 79 Cong. Rec. 9078 (1935); 80 Cong. Rec. 8111, 9415 (1936). Cf. Federal Trade Commission, *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess.

[10] Price discriminations barred by Section 2 are those which discriminate "between different purchasers of commodities of like grade and quality," whose effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowlingly receives the benefit of such discrimination, or with customers of either of them," and which cannot be justified by cost differentials inherent in the transaction, Section 2(a), 15 U.S.C. 13(a). The Commission found each of these requirements satisfied in the present case (Pet. Sep. App. FT: 59–66, 71–80), a determination the court of appeals upheld as supported by substantial evidence (Pet. App. CA: 12–15). Kroger does not challenge these findings here.

(1935). Accordingly, the Act was designed "to curb and prohibit *all devices* by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168 (emphasis supplied); *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349. Section 2(f), the "buyer provision" of the Act, serves an important function under this statutory scheme: its purpose is to reach "the buyer * * * who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." *Automatic Canteen Company* v. *Federal Trade Commission*, 346 U.S. 61, 79.

The Commission's finding that Beatrice acted in good faith, reasonably intending to meet the equally low price apparently offered by a competitor, in no way undermined the essential fact that Kroger, the largest grocery chain in the Charleston market, induced and received discriminatory prices likely to injure competition, knowing or having reason to know that such prices were not cost-justified and did not, in fact, meet competition. Kroger asserts, however, that Section 2(f) can be applied only when a seller has violated Section 2(a). It argues that a buyer, no matter how culpable, cannot violate Section 2(f) whenever his seller has a valid defense under Section 2(b).

Acceptance of Kroger's argument would lead to the anomalous result that a defense available to the seller only because of the buyer's affirmative misrepresentations must also shield the buyer. Yet the

resulting price discrimination in the buyer's favor is precisely the evil Congress sought to prevent when it enacted Section 2. Moreover, Section 2(f) "was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Automatic Canteen Company, supra,* 346 U.S. at 73. But in this case Kroger's false statement of Broughton's bid led the other sellers to believe that offers meeting that purported bid would be lawful. In short, by inducing discriminatory prices through affirmative misrepresentations, Kroger not only brought about a buyer-seller arrangement inimical to the public interest, but also, in the process of accomplishing this result, effectively deprived its potential sellers of the protection Congress sought to provide them through Section 2(f).

Congress could not have intended buyers, such as Kroger, to be allowed to immunize themselves from Section 2(f) by falsely representing outstanding offers. The language of Section 2(f) supports this conclusion. To be sure, that provision only makes it unlawful for a buyer to induce or receive a "discrimination in price which is prohibited by this section" and, under Section 2(b), a seller can offer a discriminatory price if it does so in order to meet "an equally low price of a competitor." Beatrice, the seller in this case, did not violate Section 2(b) because it believed in good faith that it was meeting a competitor's apparent low bid. But in telling Be-

atrice about Broughton's bid, Kroger knew that such a bid had not in fact been made. Kroger therefore knowingly induced and received a "discrimination in price" prohibited by Section 2: from Kroger's point of view the price it sought was in fact unlawful, even though the person offering that price did not thereby violate the Act. Section 2(f) is primarily aimed at buyers; it does not require a guilty seller. The Commission so held and the court of appeals agreed. (Pet. Sep. App. FT: 82; Pet. App. CA: 9.)

This Court's statement in *Automatic Canteen Company, supra*, 346 U.S. at 74, that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses * * * or not known by him not to be within one of those defenses" is accurate as a general proposition, which was all that was needed to decide the narrow issue in that case "involving simply the burden of coming forward with evidence under § 2(f) of the Act," 346 U.S. at 65. That statement is not controlling in the quite different factual situation involved in this case. Indeed, in *Automatic Canteen* itself, the Court cautioned against "inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings," 346 U.S. at 65, a danger that is particularly acute with respect to the Robinson-Patman Act.

2. Contrary to Kroger's claim (Pet. 21–22), the decision below will not place "buyers at their peril," nor will it force "price uniformity and rigidity."

Kroger is not precluded from "sturdy bargaining" [11] and "haggling" [12]; it is barred only from affirmatively misrepresenting competitor bids when it has reason to believe that its seller will rely on those misrepresentations and be induced to offer discriminatory prices.[13]

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[11] *Automatic Canteen*, *supra*, 346 U.S. at 74.

[12] *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 403.

[13] The related problems of price conformity and price verification were recently considered in *Wall Products Co.* v. *National Gypsum Co.*, 1971 Trade Cases ¶73,523 (N.D. Cal. 1970). There wallboard sellers agreed among themselves to exchange and verify price information regarding competitor bids supplied by their customers, an arrangement similar to that found to violate Section 1 of the Sherman Act in *United States* v. *Container Corp.*, 393 U.S. 333. The district court nevertheless upheld the arrangement, partly on the ground that such price verification was a necessary predicate to establishment of a meeting-competition defense under Section 2(b) of the Robinson-Patman Act. The court believed that this question had not been raised in *Container*. In fact, the verification problem was argued in *Container* (see Brief for Appellees at 42–43, No. 27, O.T. 1968), but neither the majority nor the dissenting opinions expressly discuss it.

In view of the severe anticompetitive potential of agreements to exchange actual price bid information, see *Container Corp.*, *supra*, we believe the instant case reflects a far better accommodation between the Sherman and Robinson-Patman Acts. The seller, without resorting to verification, can avail himself of a meeting-competition defense based on customer information regarding competitive bids unless the Commission can prove actual or imputable knowledge that the information was false. See *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F. 2d 517, 523 (C.A. 7), certiorari denied, 393 U.S. 977; *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F.2d 47, 53–55 (C.A. 1), certiorari denied, 380 U.S. 906. And, as the decision below makes clear, the Commission must prove that the buyer has "given 'false price information'" to establish a

The evidence establishes that Beatrice quoted a 20 percent discount in reliance upon Casserly's misrepresentation of the Broughton offer as being about 20 percent off list (*supra*, pp. 7–8). The evidence also shows that Beatrice's final bid was the lowest, and that Casserly accepted it on that basis (Pet. Sep. App. FT: 41–42, 46). Thus, known to Kroger but unknown to Beatrice, Beatrice undercut all competitive offers, including that of Fairmont, which was also responsive to Casserly's misrepresentation with respect to the initial Broughton proposal. The Commission properly found Kroger to have violated Section 2(f) by inducing and receiving discriminatory and anticompetitive prices from its seller as a direct consequence of its deception and overreaching. See *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F.2d 351, 365–367 (C.A. 9), reversed on other grounds, 390 U.S. 341; *Giant Food, Inc.* v. *Federal Trade Commission*, 307 F.2d 184, 186–187 (CA.D.C.), certiorari denied, 372 U.S. 910.

3. Kroger's remaining contentions are without substance. Kroger asserts it was not until the case reached the Commission that Commission counsel first disputed Casserly's characterization of the Broughton bid, thereby denying Kroger procedural due process (Pet. 23–24). The record is to the contrary. Commission counsel unequivocally stated in a reply memorandum filed with the hearing examiner two months

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Section 2(f) violation against the buyer. (Pet. App. CA 2.) Neither buyer nor seller acts at his peril, and hard bargaining is not inhibited, since good faith furnishes a complete defense to a Section 2 charge.

prior to his initial decision, that with respect to the alleged 20 percent Broughton discount, "[i]n actuality, an examination of this Broughton proposal shows that it did not offer a uniform 20% discount and that the prices offered Kroger in this proposal were substantially higher than those granted by Beatrice." [14] The court of appeals correctly held that before the examiner, Kroger was fully apprised of Commission counsel's challenge to Casserly's representation of the initial Broughton discount (Pet. App. C.A.: 11).

There is no basis for Kroger's claim that the complaint and the hearing did not give it adequate notice of its independent liability under Section 2(f) of the Act (Pet. pp. 24–26). Count II of the complaint charged Kroger with having violated Section 2(f), in language almost identical to that in the Act.[15] Pleadings before the Commission in the language of the statute are sufficient. *A. E. Staley Mfg. Co.* v. *Federal Trade Commission,* 135 F.2d 453, 454 (C.A. 7).

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[14] See "Reply of Counsel Supporting the Complaint to Respondent's Proposed Findings of Fact, Conclusions of Law and Supporting Memorandums," filed on July 21, 1967.

[15] The complaint charged, *inter alia* (Pet. Sep. App. SD:175–176): "In the course and conduct of its business in commerce, Kroger has knowingly induced or received discriminations in price which are prohibited by subsection (a) of Section 2 of the Clayton Act, as amended.

"For example, respondent Kroger, in its negotiations with respondent Beatrice, before and after June 4, 1962, for the supply of fluid milk and other dairy products under private label to the stores of Kroger's Charleston Division, knowingly induced prices which were and are discriminatory under the provisions of Section 2 of the amended Clayton Act, as set forth in Count I of this complaint. * * *"

Moreover, in arguing that the hearing was conducted on the sole premise of Kroger's derivative liability, Kroger ignores its own repeated objections to the relevance of certain evidence to Kroger but not Beatrice (Tr. 203–204, 251, 476, 1412, 2445). Indeed, Kroger, through its counsel, stated: "[T]here is no conspiracy charge in this case. The independent acts of Party A had nothing to do with the responsibilities of Party B" (Tr. 476). As the court of appeals noted: "[t]hat is exactly the theory on which the Commission acted in finding Kroger responsible" (Pet. App. CA:12).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

A. RAYMOND RANDOLPH, Jr.,
Assistant to the Solicitor General.

GREGORY B. HOVENDON,
STEPHEN RUBIN,
Attorneys.

JOSEPH MARTIN, Jr.,
General Counsel,

HAROLD D. RHYNEDANCE, Jr.,
Assistant General Counsel,

MILES J. BROWN,
KARL H. BUSCHMANN,
Attorneys,
Federal Trade Commission.

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